Supreme Court, U. S.
FILED
MAR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1154

MILWAUKEE NEWSPAPER AND GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 23,

Petitioner,

v.

NEWSPAPERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID W. CROYSDALE
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Counsel for Respondent

Of Counsel:

HERZ, LEVIN, TEPER, CHERNOF & SUMNER, S.C.
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

March 5, 1979

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Question Presented	2
Statement of the Case	2
Argument	3
I. There is No Issue of Preemption in this Case..	3
II. The Case Below was Decided Correctly	4
III. The Decisions of State Supreme Courts Cited by Petitioner are Inapposite	8
IV. There is No Important Question of Federal Labor Law	10
Conclusion	10

CITATIONS

Cases:

Arnold Co. v. Carpenters District Council, 417 U.S. 12 (1974)	3
Audit Services, Inc. v. Elmo Road Corp., 575 P.2d 77 (Mont. 1978)	9
Botany Industries, Inc. v. New York Joint Board, Amalgamated Clothing Workers, 375 F.Supp. 485 (S.D. N.Y. 1974)	4, 8

Page

Building Service Employees, Local 252 v. Schlesinger, 440 Pa. 448, 269 A.2d 894 (1970) 9

Corvallis Sand & Gravel Co. v. Hoisting & Portable Engineers, 247 Ore. 158, 419 P.2d 38 (1966).... 9

Ewert v. Bluejacket, 259 U.S. 129 (1922) 7

Hurd v. Hodge, 334 U.S. 24 (1948) 4, 8

Local 453, IUE v. Otis Elevator Co., 314 F.2d 25 (2nd Cir. 1963) 8

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 5

NLRB v. Columbus Printing Pressmen and Assistants' Union No. 252, 543 F.2d 1161 (5th Cir. 1976) 5, 6

NLRB v. Greensboro Printing Pressmen Union No. 319, 549 F.2d 308 (4th Cir. 1977) 5

NLRB v. Massachusetts Nurses Association, 557 F.2d 894 (1st Cir. 1977) 5

NLRB v. Sheet Metal Workers International Association, Local Union No. 38, 575 F.2d 394 (2nd Cir. 1978) 6, 7

Nordstrom, Inc., 229 N.L.R.B. No. 70, 1977-78 CCH NLRB ¶18,188 (1977) 5

Sears, Roebuck and Company v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 3

Sheet Metal Workers International Association v. Employers Association of Roofers & Sheet Metal Workers, 430 F.Supp. 540 (D.Del. 1977) 7, 8

Page

Smith v. Evening News Association, 371 U.S. 195 (1962) 3

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) 8

Trust Fund Services v. Heyman, 88 Wash. 2d 698, 565 P.2d 805 (1977) 8

Walter E. Heyman d/b/a Stanwood Thriftmart, 216 N.L.R.B. No. 154, 1974-75 CCH NLRB ¶15,536 9

Statutes:

Labor Management Relations Act of 1947, as amended, Section 301, 29 U.S.C. Sec. 185 .....1, 2, 3, 8, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1154

MILWAUKEE NEWSPAPER AND GRAPHIC COMMUNICATIONS UNION, LOCAL NO. 23,

Petitioner,

v.

NEWSPAPERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. of the Pet., p. A-1) is unreported. The opinion of the Circuit Court of Appeals for the Seventh Circuit (App. of the Pet., p. A-7) is reported at 586 F.2d 19 (7th Cir. 1978).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of Sections 8(b)(3) and 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. Secs. 158(b)(3) and 158(d) of Section 301

of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 185, are set forth in the Petition at pages 2-3.

QUESTION PRESENTED

Whether, in an action to compel arbitration under Section 301(a) of the Labor Management Relations Act, the district court should ignore settled principles of national labor policy as expressed in decisions of the National Labor Relations Board and affirmed by the Circuit Courts of Appeal.

STATEMENT OF THE CASE

The Statement of the Case set out in the Petition (at pp. 3-4) is in most respects accurate. However, there are certain characterizations which require clarification or correction as follows: first, with respect to the arbitration provision, the respondent took the position in the district court that established national labor policy was against submitting to interest arbitration disputes over inclusion of interest arbitration clauses in new contracts and that therefore the court should decline to so order in this case (App. of the Pet., p. A-3); second, in denying petitioner's motion for summary judgment on the question of submission to arbitration of the dispute over inclusion, modification, or deletion of the arbitration clause, the district court reasoned that a Court should not violate national labor policy, as declared by the National Labor Relations Board, by taking contrary actions in the context of a Section 301 enforcement proceeding (App. of the Pet., p. A-4); finally, the Court of Appeals for the Seventh Circuit affirmed the district court on the ground that, inasmuch as Board policy was

well-established and clearly applicable, such policy "should not be flouted by a court in a Section 301 enforcement action" (App. of the Pet., pp. A-10, A-11).

ARGUMENT

I.

THERE IS NO ISSUE OF PREEMPTION IN THIS CASE

Contrary to the assertion in the Petition (p. 5 ff.), there is no issue of preemption in this case. It is beyond doubt that when the activity in question is arguably an unfair labor practice prohibited by the National Labor Relations Act, the authority of the National Labor Relations Board is not exclusive and does not destroy the jurisdiction of the courts in suits under §301 of the Labor Management Relations Act. *Arnold Co. v. Carpenters District Council,* 417 U.S. 12, 15-16 (1974); *Smith v. Evening News Association,* 371 U.S. 195, 197 (1962). The Court of Appeals in this case decided no more (App. of the Pet., p. A-10).

Nor does anything in *Sears, Roebuck and Company v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978), indicate otherwise. Even on petitioner's interpretation (Pet., pp. 5-8), that case teaches no more than that an employer may not bring before a state court a controversy identical to that which it might have brought before the NLRB. In the present case, the respondent did not initiate the action in the district court nor did it seek remedial relief for any unfair labor practice committed by the Union. Rather, respondent asked only that the district court, in passing upon the enforcement of a contract provision, recognize settled principles of national labor policy.

II.

THE CASE BELOW WAS DECIDED CORRECTLY

When this case came on for decision before the district court, the sole remaining issue was "whether or not the Company should be required to submit to interest arbitration on the inclusion of an interest arbitration clause in the new contract" (App. of the Pet., p. A-2).

Before passing upon this issue, the court was properly concerned that its decision be harmonious with national labor policy. This was in keeping with the general principle that although a district court may compel arbitration pursuant to a labor contract,

> [t]he power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Hurd v. Hodge, 334 U.S. 24, 34-35 (1948); *Botany Industries, Inc. v. New York Joint Board, Amalgamated Clothing Workers,* 375 F.Supp. 485, 490-93 (S.D. N.Y. 1974) (holding *Hurd v. Hodge* applicable to collective bargaining agreements).

Consequently, the court turned its attention to an unbroken line of decisions holding it is an unfair labor practice for a union to insist to impasse on having an interest arbitration clause included in a new contract.[1]

[1] In a section of the Petition purporting to demonstrate that an important question of federal law is at issue herein, petitioner turns to the merits and appears to argue that the district court did not have before it facts sufficient to determine that the holdings in *NLRB v. Columbus Printing Pressmen,* et al. were on point. However, those decisions were squarely applicable since two key facts had clearly been established: that the subject of the dispute was an interest arbitration clause and that impasse had been reached (the former fact is undeniable and the latter was established by the petitioner's own charge) (App. of the Pet., p. A-2).

As for petitioner's insistence that *Nordstrom, Inc.,* 229 NLRB No. 70 (1977) has some bearing upon this case, the district court's opinion effectively disposes of that contention (App. of the Pet., pp. A-4, A-5).

Among the cases considered by the district court were *NLRB v. Columbus Printing Pressmen and Assistants' Union No. 252,* 543 F.2d 1161 (5th Cir. 1976); *NLRB v. Greensboro Printing Pressmen Union No. 319,* 549 F.2d 308 (4th Cir. 1977); and *NLRB v. Massachusetts Nurses Association,* 557 F.2d 894 (1st Cir. 1977). Focussing on *Columbus Printing Pressmen,* the court analyzed the national labor policy expressed therein and found it dispositive of the present case.

In *Columbus Printing Pressmen,* the Fifth Circuit noted that interest arbitration is a means of impasse resolution whereby an arbitrator, not the parties, determines the content of the new labor contract. *Id.* 1169-70. As such it

> runs counter to a basic premise of the Act — that the cause of industrial peace is best served when "the balance of bargaining advantage [is] set by economic power realities." *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 92 S.Ct. 1571, 1582, 32 L.Ed.2d 61, 73 (1972). The Supreme Court has repeated this premise several times in recent years, ...

Id. at 1170. Further, that court opined that perpetuation of contract arbitration clauses in successive contracts might result in increased industrial unrest because the parties are unable to control their own agreement. *Id.*

In conclusion, the Fifth Circuit stated that a union was prohibited from

> enforcement of a contract arbitration clause in a section 301 suit brought for the purpose of perpetuating inclusion of the clause. Courts cannot bind the parties in perpetuity to forego use of economic weapons in support of bargaining positions. There must remain opportunity for parties to readjust their relationship in response to changed economic circumstances.
>
> We do not hold that contract arbitration clauses are wholly unenforceable. We simply hold that they are not enforceable to perpetuate inclusion of contract arbitration clauses continuously in contract after contract. . . . This scheme best reconciles the goals of promoting peaceful resolution of contract disputes and of allowing the parties' relationship and bargaining strengths to reflect changed economic circumstances. The Board was correct in deciding that the union here committed a refusal to bargain unfair labor practice by insisting to impasse that the employer submit to contract arbitration and issue of whether a contract arbitration clause should be retained or deleted in the 1973-76 collective bargaining agreement.

Id. at 1170-71 [footnotes omitted].

It cannot be emphasized too strongly, that in the process of decision the district court carefully avoided assuming the role of the National Labor Relations Board to ajudicate unfair labor practice charges. Rather, it correctly concluded that in determining whether a particular provision of a contract should be enforced the court must consider and give effect to national labor policy. In affirming the district court, the Court of Appeals took notice that the relevant Board policy had yet again been affirmed in *NLRB v. Sheet Metal Workers International Association, Local Union No. 38,* 575 F.2d 394 (2nd Cir. 1978), and concluded that the policy "should not be flouted by a court in a Section 301 enforcement action" (App. of the Pet., p. A-11).

A recent district court decision shows that the approach of the district court and Court of Appeals herein is not unique. In *Sheet Metal Wkrs. Int'l. Ass'n v. Employers Ass'n of Roofers & S. M. Wkrs.,* 430 F.Supp. 540 (D. Del. 1977), the union brought an action under Section 301 to enforce an arbitration award it had received which continued the old agreement's interest arbitration clause in a new contract. The employer had refused to participate in the arbitration proceeding because renewal of the interest arbitration clause was an issue. As a defense to the Section 301 suit, the employer asserted the illegality of the award and the union's bargaining posture.

The Court refused to enforce the award, *inter alia,* because the union had violated the Act by insisting upon the interest arbitration provision. The Court reasoned:

> Thus, the basic issue confronting the Court is whether an interest arbitration award that is a direct and immediate product of unlawful conduct should be enforced.
>
> It is readily apparent that a contract resulting from a statutory violation should not be enforced. *Ewert v. Bluejacket,* 259 U.S. 129, 138, 42 S.Ct. 442, 66 L.Ed. 858 (1922).
>
> > "It is no less true in suits brought under §301 to enforce arbitration awards than in other lawsuits that the 'power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United

States. . . .' *Hurd v. Hodge,* 334 U.S. 24, 34-35 [68 S.Ct. 847, 92 L.Ed. 1187] (1948). The public policy to be enforced is a part of the substantive principles of federal labor law which federal courts, under the mandate of *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 [77 S.Ct. 912, 1 L.Ed.2d 972] (1957), are empowered to fashion." *Local 453, IUE v. Otis Elevator Co.,* 314 F.2d 25, 29 (C.A. 2, 1963), *cert. denied,* 373 U.S. 949, 83 S.Ct. 1680, 10 L.Ed. 705 (1963).

See Botany Industries, Inc. v. New York Joint Board [Amalgamated Clothing Workers], 375 F. Supp. 485, 490-94 (S.D. N.Y. 1974), *vacated and dismissed as moot,* 506 F.2d 1246 (C.A. 2, 1974).

Sheet Metal Wkrs., 430 F.Supp. 540, 544 (D. Del. 1977).

As a practical matter, the gist of petitioner's argument is that a court in a Section 301 action must put on blinders and press on without regard for national labor policy as enunciated by the NLRB. It is difficult to imagine a principle which would be more productive of chaos and confusion in labor relations.

III.

THE DECISIONS OF STATE SUPREME COURTS CITED BY PETITIONER ARE INAPPOSITE

In an attempt to find case law in conflict with the present decision of the Court of Appeals, petitioner resorts to several state supreme court cases. These cases, however, are inapposite.

Trust Fund Services v. Heyman, 88 Wash. 2d 698, 565 P.2d 805 (1977), held merely that §301 actions could not be brought to *rescind* labor contracts but only to

enforce them.[2] Only after deciding there was no §301 jurisdiction to rescind the contract did the court continue by way of dictum to opine that even if such jurisdiction did exist, rescission could not be granted on the basis of an alleged unfair labor practice.

Similarly, *Corvallis Sand & Gravel Co. v. Hoisting & Portable Engineers,* 247 Ore. 158, 419 P.2d 38 (1966), proceeded on the ground that a state court could not entertain a suit to *rescind* a labor contract since such rescissions are not within the term "suits for violation of contracts" as contemplated by the statute. The fact that the narrow issue was the entertainment of suits for rescission is shown by the court's acknowledgment that the statute does comprehend a suit for a declaratory judgment that a provision of the contract is unenforceable because compliance would be an unfair labor practice. 419 P.2d at 44.

Audit Services, Inc. v. Elmo Road Corp., 575 P.2d 77 (Mont. 1978), held that a state court erred in invalidating compliance agreements which were proper on their face on the ground that state courts lack the authority to do so. *Building Service Employees, Local 252 v. Schlesinger,* 440 Pa. 448, 269 A.2d 894 (1970), was a case involving unfair labor practice determinations under the Pennsylvania Labor Relations Act. In an action to compel employees to comply with certain provisions of a collective bargaining agreement, it was held that an unfair labor practice defense was not available because exclusive jurisdiction to find and prevent unfair labor practices vests with the federal or state labor relations

[2] Nor did the NLRB consider the §301 action to be anything more: "As to the decision under Section 301 of the LMRA, it was not clear that the suit was anything more than a prayer for rescission based on the claim that the union lacked majority status." *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB No. 154, 1974-75 CCH NLRB ¶15,536, at p. 25,826.

boards. In the present case, by contrast, the district court did not conceive of its task as being one finding and preventing unfair labor practices; rather, it sought only to harmonize its decision with prevailing national labor policy.

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LABOR LAW

The sole matter at issue here is whether a court in adjudicating a §301 action should recognize and give effect to clear and settled principles of national labor policy as enunciated by the NLRB and the Circuit Courts of Appeal. It is difficult to understand how such deference would frustrate "the Congressional intent in establishing a centralized and uniform administration of the National Labor Relations Act" (Pet., at p. 13); to the contrary, such deference serves to promote that intent. To do otherwise permits petitioner, by the simple expedient of its §301 action, to thrust the court into the anomalous position of repudiating national labor policy under the guise of contract enforcement.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID W. CROYSDALE
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Of Counsel:

HERZ, LEVIN, TEPER, CHERNOF & SUMNER, S.C.
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone: (414) 273-4333

March 5, 1979